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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

HUN-1

No. 99

OBIE FAUSTER HUNTER, et al.,
Petitioners,

vs.

C. D. SHEPHERD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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June 4, 1951.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX.

PAGE

Petition:

Statement of Matter Involved.....3-10

Statement as to Jurisdiction.....10-12

Questions Presented 12, 13

Reasons for Allowance of this Petition.....13-15

Prayer 16

Brief:

Opinions of the Courts Below, Jurisdiction, and Statement of the Case..... 17

Specification of Errors..... 18

Summary of Argument.....20, 21

Argument 22-35

I. The National Railroad Adjustment Board, First Division did not have jurisdiction to render a valid award against the petitioners who were employees involved in the dispute submitted to it, where the Board failed to give due notice of all hearings and an opportunity to be heard in person, by counsel or by a representative authorized by them to appear on their behalf, as required by Section 3, First (j) of the Railway Labor Act (45 U. S. C. A., 153 (j)).....22-25

II. The opinion rendered by the Court of Appeals in the instant case conflicts with the opinion of the same Court of Appeals rendered on the same day involving the same proposition of law and conflicts with the decision rendered in the Eighth Circuit 25-28

AUG 7 1953

III. It is contended by the petitioners that the Court of Appeals in the instant case had no jurisdiction to interpolate in Section 3, First (j) of the Railway Labor Act, the words, "reasonable actual notice", "formal notice" or "knowledge" and substitute the interpolated words for the plain provision of Section 3, First (j) which requires, that the Board shall give due notice of all hearings to the employees involved in the dispute submitted to the Board and afford said employees an opportunity to appear and defend 28, 29

IV. The Court of Appeals erred in holding that it was error for the District Court to hold that the offer of proof by Respondents was insufficient in law as a defense under the state of the pleadings 29-32

V. Where an application for an interlocutory injunction requires a decision on the merits of the sole point in controversy an affirmance of the judgment, by the Court of Review is the law of "the case" and is to be followed by the trial court 32-35

Conclusion 36

TABLE OF CASES.

Bates v. Brown, 72 U. S. 710..... 29

Brotherhood of Railroad Trainmen v. Templeton, 181 F. (2d) 525, 534 (C. C. A. 8), Cert. Den. 340 U. S. 825, rehearing Den. 340 U. S. 885, C. C. H. Labor Reports, Vol. 19, par. 66,251..... 12, 19, 23, 25, 27

Cole v. Ralph, 352 U. S. 286, 289..... 11

Elgin, Joliet & Eastern Ry. Co. v. Burlap, 325 U. S. 711 ..... 13, 14, 22, 26

Elgin, Joliet & Eastern Ry. Co. v. Burlap, 327 U. S. 661 13

Hunter et al. v. The Atchison, Topeka and Santa Fe Railway Co., etc., et al., 171 F. 2d 594 (C. A. 7), cert. Den., 337 U. S. 916, 78 F. Supp. 934..... 3, 17, 23, 33

Just, et al. v. Chambers, Executrix, 312 U. S. 383, 385 11

Kirby v. Pennsylvania Railway Company, No. 10290 (C. A. 3) Opinion, April 23, 1951, reported Labor cases, Federal and State Courts, No. 663, 310 C. C. H. Labor Reports, Vol. 19, par. 66,310.....24, 27

Lohsen v. Lawson, 106 Vt. 481, 174 A. 861, 95 A. L. R. 309 Sec. 31

Lord, et al. v. Corporation of America, 35 F. (2d) 962 35

Lord, et al. v. Radio Corporation of America, 24 F. (2d) 1263 .....33, 34

Missouri-Kansas-Texas Railroad Co., et al. v. Brotherhood of Railway and Steamboat Clerks, et al., Nos. 10219, 10220, Opinion March 26, 1951 (C. A. 7), C. C. H. Labor Reports, Vol. 19, par. 66,264.....
.....11, 12, 19, 23, 25, 27, 35

Morris v. E. I. DuPont de Nemours & Co., 346 Mo. 126, 132, 139 S. W. (2d) 984, 129 A. L. R. 352..... 31

Nord v. Griffin, 86 F. (2d) 481 (C. A. 7), 484, Cert. den. 300 U. S. 673 .....15, 23, 29, 34

Obie Fauster Hunter, et al. v. Atchison, Topeka and Santa Fe Railway Company, etc., et al., No. 10254 Court of Appeals 7th Opinion, March 26, 1951. Labor Cases 1, 16, 17

Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. Ed. 1427 30

Radio Corporation of America v. DeForest Radio Co., 47 F. (2d) 660.....33, 34

Radio Corporation of America v. Lord et al., 28 F. (2d) 1265 .....33, 34

Sheldon v. Metro-Goldwin Pictures Corp. et al., 390 U. S. 396..... 11

Sibbach v. Wilson, 312 U. S. 1, 7..... 11

Spiller v. Atchison, Topeka & Santa Fe Ry. Co., 253 U. S. 117..... 11

United States v. General Motors Corp., 323 U. S. 373, 374 11

RULES.

Rules of Civil Procedure for District Courts of the United States:

Rule 12 (h) 32
Rule 56 (c) 31

Revised Rules of the Supreme Court of the United States:

Rule 38 5 (b) 1, 2, 10
Rule 43 (c) 31

STATUTES.

Judiciary and Judicial Procedure:

Section 1254 .....10, 18
Section 2101 (c) 10, 18

Railway Labor Act:

Section 3 First (j) (45 U. S. C. A. Sec. 153, First (j)) 6, 8, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 27, 28, 31, 33, 34, 35, 36

Textbooks:

53 Am. Jur., Sec. 99, p. 88..... 31

CONSTITUTION.

United States Constitution, Fifth Amendment....23, 24, 30

IN THE

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No.

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C. D. SHEPHERD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Fred A. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

(Emphasis ours where used in this Petition.)

Your petitioners, Obie Fauster Hunter, Alvah Clayeton Bauchman, Wilborn Williams, James Paul Jackson, William Henry Austin, Milton Lindsay McDaniel, Charles Freeman Bland, Richard William Theophilus Jones, Jr., Golden Earl Crayton, Frank Banks, Willard Pearson, Wil-

liam C. Berry, John Wesley Cole, Ollie Joseph Collins, William Collins, Conrad Livingston Evans, Charles Ulysses Hunn, William Johnson, Henry Jones, Charles Allen Major, Jr., Cenis Petty, Otto Grant Palmer, Jesse John Arthur Smith, Charles Lee Thomas, Howard Thompson, Sidney Wadley, Ernest Wagner, Andrew Wellons, Lester Burney Hunn, James Walter Jackson, L. J. Manley, James Collins, Sr., Paul Downing, Ollie Lee Hawkins, James D. Burton, Edward Hill, C. C. Smith, Robert Moffett, John J. Collins, and William M. Jackson, who are of the craft of employees, known as train porters, or porter trainmen, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment entered by that court on March 26, 1951, which became final on denial on a petition for rehearing entered May 1, 1951, which judgment reversed the order and decree for a permanent injunction entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, with directions to proceed in conformity with the opinion of the said United States Court of Appeals for the Seventh Circuit.

The Transcript of Record in the case including the proceedings in the Court of Appeals, is furnished forthwith in accordance with Rule 38 of the Rules of this Court. The decision of the Court of Appeals appears in the record at pages 359-369.* The opinion of the trial court appears in the record at page 335.**

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* Such decision was rendered March 26, 1951, Case No. 10254, United States Court of Appeals for the Seventh Circuit, entitled *Obie Fauster Hunter, et al.* v. *Atchison, Topeka and Santa Fe Railway Company, et al.*

** The findings of Fact, Conclusions of Law and order for temporary injunction appear in the record pp. 253-260.

Statement of the Matter Involved.

This action was begun by the Petitioners, Obie Fauster Hunter, on behalf of himself and all other members of the class or craft to which he belongs (hereinafter referred to as Petitioners) in the United States District Court for the Northern District of Illinois, Eastern Division, against the Atchison, Topeka and Santa Fe Railway Company (hereinafter called Santa Fe), the National Railroad Adjustment Board (hereinafter referred to as The Board), F. W. Coyle, vice president of the Brotherhood of Railroad Trainmen (hereinafter called the Brotherhood), and nine individual brakemen (hereinafter referred to as brakemen-defendants), employees of the Santa Fe and members of the Brotherhood to whom the disputed work was awarded by the award under attack, and James B. Riley, who acted as Referee and member of the National Railway Adjustment Board, First Division, for the order and award No. 6640, Docket 7400.

2. The Board and its members filed an answer to the complaint but did not participate in the hearing nor any appeals from the order of the District Court granting the temporary injunction and the decree granting the permanent injunction; and it abandoned any defense to the complaint filed by the Petitioners.

3. James B. Riley, the Referee, being without the jurisdiction of the Court, was not served with summons and did not participate in any of the proceedings.

4. A statement of the case is found in the opinion rendered December 14, 1948, affirming the preliminary injunction, *Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Company, etc., et al.*, 171 F. 2nd 594, Cer. Den. 337 U. S. 916; and in the opinion rendered by the Court of Appeals in the instant case March 26, 1951 (R. 359-

369). The statement of the case by the Court of Appeals with minor changes of the "Plaintiffs" to "Petitioners" may be summarized as follows:

5. In 1944 Petitioners, a group of train porters and chair-car attendants employed by the Santa Fe Railway Company (hereinafter called "Santa Fe"), commenced this action upon behalf of all members of a class asking the court to enjoin the defendants from enforcement of Order and Award 6640 of the National Railway Adjustment Board (hereinafter called "Adjustment Board"). In the complaint and exhibits attached thereto (R. 4-68) Petitioners allege that they are employees at will, but with seniority rights, that their employment is threatened by Award 6640 of the Adjustment Board, First Division, dated April 20, 1942, that said award was and is void in that they were parties involved in the dispute before the Adjustment Board between the Santa Fe and the Brotherhood of Railroad Trainmen (hereinafter called "BRT"), but that they had no notice of the proceedings therein (R. 23, 24, 35, 36, 42). The defendants named are the Santa Fe; the Adjustment Board, its members and secretary; F. W. Coyle, a vice president of BRT; and nine individual brakemen members of BRT as representatives of a class.

6. In the dispute it was the claim of the brakemen that their working agreement with the Santa Fe covered all braking duties including those performed by train porters on the head end of the Santa Fe passenger trains. On the other hand the train porters pointed out that since March 1, 1899 (R. 13, 14, 16) they have continuously performed the disputed work, that although they do not have a collective bargaining agreement the railroad carried them on separate seniority rosters, and that under operating rules promulgated in 1904 and through custom and practice extending for more than fifty years, they have a contractual right to perform such services (R. 17, 18).

7. The dispute as to which employees should have the right to do the work is of long standing, dating back to about 1900. In 1925 a protest was made by BRT to Train Service Board of Adjustment for the Western Region, the basic issue being the same as the one here under consideration. On September 9, 1926, the Train Service Board ruled against the claim of BRT. Thereafter BRT negotiated a schedule agreement with Santa Fe, effective December 1, 1926 (R. 19-22). Thereafter BRT again presented the same issue to the Train Service Board, which, on February 8, 1927, again denied their claim. Prior to this latter decision, the parties had entered into a written agreement that the decision in the case should be final and binding upon the parties to the dispute.

8. Award 6640 resulted from a protest which BRT filed in 1939 upon behalf of four brakemen in Texas. It is admitted that the Adjustment Board did not give notice of the proceedings or hearing to the petiitoners herein. The Adjustment Board, with five dissenting votes, found that the Santa Fe's use of porters not holding seniority as brakemen for the performance of duties on the head end of passenger trains was a violation of the brakemen's seniority rights, and that their specific claims then on file for lost wages should be allowed (R. 61, 64). Thereafter, upon demand of the brakemen, the Santa Fe notified petitioners that the Adjustment Board's award would be immediately enforced against them by their removal from their regular runs, and that they would be replaced by members of the craft to which the brakemen belonged. In fact, some of the petitioners and members of the class to which they belonged actually were removed from their regular runs and replaced by brakemen (R. 29, 32). Petitioners then commenced this suit.

9. Based upon the verified complaint and the affidavit of James M. Jackson, one of the petitioners, the district court issued a temporary restraining order on October 31, 1944 (R. 246-252). On February 6, 1948, the district court issued a preliminary injunction [1] (R. 253-260). At the hearing for preliminary injunction petitioners re-offered the Jackson affidavit and produced two witnesses, McFarland (R. 208-224), the secretary of the First Division of the Adjustment Board, and Kirkpatrick (R. 174-202), a Santa Fe official, who negotiated the agreement with the BRT. Petitioners also offered certain correspondence between them and the Santa Fe. The brakemen did not produce any witnesses on the hearing for the preliminary injunction, but offered a part of a deposition of one Palmer (R. 227-244) and the printed report of the Adjustment Board proceedings (R. 299-327).

10. The order for the preliminary injunction was appealed to this court and was affirmed. 171 F. 2d 594, certiorari denied 337 U. S. 916. This court held that the award of the Adjustment Board was void, primarily because it was made without giving the train porters the required statutory notice,[2] and because their constitutional rights to participate in the proceedings before the Adjustment Board were denied. We also pointed out that the 1926 agreement between the Santa Fe and the BRT specifically provided that it did not change, alter or extend the rules pertaining to train porters,[3] and stated that in making the

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[1] See 78 F. Supp. 984 for the findings of fact and conclusions of law.

[2] Paragraph First (j) of Section 3, Railway Labor Act, 45 U. S. C. A. 153, First (j), provides, "* * * the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

[3] Article XXIX of the Working Agreement reads: "The term 'Trainman' or 'Trainmen', as used in this agreement, is understood to mean freight and passenger Brakemen, and Baggagemen, with the further understanding that this definition does not change, alter or extend present application of these rules to baggagemen or train porters."

award the Adjustment Board had exceeded its statutory authority to interpret or apply the contract as it existed, and in effect had made a new and different contract between the brakemen and the railroad.

11. After remandment the brakemen-defendants filed a motion requiring petitioners and Santa Fe to produce certain documents for inspection and copying, bearing upon the question of actual knowledge of the petitioners of the Adjustment Board proceedings in the Santa Fe-BRT dispute. The district court denied the motion on the ground that the evidence sought did not pertain to the only issue herein, namely, the validity of the award of the Adjustment Board, and that this issue had been finally determined in connection with the hearing on the preliminary injunction, and the appeal therefrom. The district court then set a date for final hearing. In a colloquy with counsel for the brakemen-defendants, the court indicated that objections would be sustained if evidence of a certain type were offered on the final hearing, the court being of the opinion that the only real issue in the case had already been decided. A proposed offer of proof could be made at the final hearing without the presence of witnesses in court, but that such witnesses might be produced if counsel so desired.

12. The final hearing was held June 29, 1950. Petitioners offered the testimony which had been received on the hearing for the preliminary injunction, including the affidavit of petitioner Jackson, and a transcript of the testimony of witnesses McFarland and Kirkpatrick. No showing was made that any of these witnesses were unavailable to testify personally. This evidence was received over the objection of the brakemen-defendants, who also made a motion for dismissal of the action. The brakemen-defendants then presented an offer of proof (R. 134-155), which occupies some twenty pages in the printed record, as well as the published report of the proceedings of the

Adjustment Board resulting in Award 6640, the basic contract or working agreement (R. 261-291) between the brakemen and the Santa Fe, and also the contract between the brakemen and the Santa Fe dated April 27, 1944 (R. 292-298).

13. The material part of the offer of proof involved in the opinion is as follows: "(3) Petitioners had actual notice of the pendency before the National Railroad Adjustment Board of the dispute between the Santa Fe and the brakemen; that petitioners authorized the Santa Fe to represent their interests, and did not seek to intervene * * *."

14. All evidence offered by the brakemen-defendants under the offer of proof, in the trial court, was rejected for the following reasons:

1. Because the offer of proof failed to show its relevancy, materiality and competency pertaining to the sole issue in the case; i. e.: The validity of the award which had been declared void by the court of appeals.
2. Because the trial court, after full hearing on the preliminary injunction, had found the award void for failure of the Board to give notice of the hearing as required by Section 3 First (j) of the Railway Labor Act.
3. Because the brakemen-defendants had admitted by the pleading that no notice was given as required by Section 3 First (j) of the Railway Labor Act; and further that in their answer they had denied that the petitioners were entitled to notice of hearings before the Board.

15. The district court made findings of fact and conclusions of law, and entered a decree granting a permanent

injunction. In the findings of fact the court found that on the hearing for the preliminary injunction, the court had determined that the award of the Adjustment Board was void because notice (R. 256, 258) of the hearing had not been given by the Adjustment Board to the train porters as required by statute, that the Court of Appeals had likewise decided the question on the merits and had affirmed the judgment of the district court, and that no new facts had been elicited to show that the preliminary injunction should not be made permanent.

16. The district court also found that petitioners are members of a class or craft of railway employees composed entirely of colored persons, known as porter-brakemen or train porters, who have been employed by Santa Fe as such class or craft since 1899; that the named defendants-brakemen represented all Santa Fe brakemen as a class; that petitioners were employed at will but with seniority rights in their employment; that Santa Fe willed to terminate petitioners' employment only through the insistence of the BRT; that Santa Fe will, unless enjoined, displace the petitioners in their employment solely by reason of Order and Award 6640. There was no finding as to actual knowledge by petitioners of the Adjustment Board's proceedings, or whether petitioners acquiesced in the position taken by Santa Fe. Also there was no mention made in the findings as to the contract between Santa Fe and BRT dated April 27, 1944.

The Court of Appeals in the instant case held, that in the prior appeal its affirmance of the order granting the temporary injunction and which order of the District Court was based upon findings of fact and conclusions of law, after a full hearing in the District Court on the validity of the award and in which order the District Court held that the Award was void by reason of the failure of the

Board to give due notice as required by Section 3, First (j) of the Railway Labor Act, and which order was affirmed by the Court of Appeals for the Seventh Circuit (171 F. 2d, 594, cert. den. 337 U. S. 916), was not the law of the case, and that the District Court erred in failing to receive evidence on behalf of the respondents, which might sustain their claim that petitioners adversely affected, did have reasonable actual notice of all hearings before the Board or that they had authorized the Santa Fe to represent them in such proceedings (R. 368). The Court of Appeals reversed the order and decree for a permanent injunction with directions to proceed in conformity with the opinion.

Jurisdiction.

1. The decision of the Court of Appeals was entered on March 26, 1951 (R. 359-369).

2. A petition for rehearing was denied by the Court of Appeals on May 1, 1951 (R. 415).

3. The jurisdiction of the court is invoked under Section 1254(1) and Section 2101(c) of the Judiciary and Judicial Procedure (28 U. S. C.) and Section 5 (b) of Rule 38 of this Court.

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by

a lower court, as to call for an exercise of this court's power of supervision."

4. The Supreme Court has granted writs of certiorari under the following circumstances:

(a) Where the decisions of the Circuit Courts of Appeals are in conflict, one with the other, in the Third, Eighth and Seventh Circuits.

Cole v. *Ralph,* 352 U. S. 286, 289.

(b) Where in view of the importance of the question, which appears to be one of first impression, in the application of the law involved.

Sheldon v. *Metro-Goldwin Pictures Corp., et al.,* 390 U. S. 390, 396.

Sibbach v. *Wilson & Co.,* 312 U. S. 1, 7.

Just, et al. v. *Chambers, Executrix,* 312 U. S. 383, 385.

(c) Where a ruling on the questions involved is fundamental to the further conduct of the case.

United States v. *General Motors Corp.,* 323 U. S. 373, 374.

(d) Where the construction and application of Section 3, First (j) of the Railway Labor Act is of general interest throughout the United States, wherever the law is operative.

Cole v. *Ralph,* 352 U. S. 286, 289.

(e) Where the judgment of the circuit courts of appeals reversed and remanded with directions to proceed in conformity with the opinion.

Spiller v. *Atchison, Topeka & Santa Fe Railway Co.,* 253 U. S. 117.

Questions Presented.

The questions presented herein include the following:

1. Whether the National Railroad Adjustment Board, First Division, has jurisdiction to render a valid award against an employee or employees involved in any dispute submitted to it, in a case where the Board has failed to give such employee or employees *due notice of all hearings and an* opportunity to be heard, whether in person, by counsel, or by other representatives as they may respectively elect, as required by Section 3, First (j) of the Railway Labor Act. (45 U. S. C. A. 153 (j).)?

2. Does the opinion rendered by the Court of Appeals in the instant case, conflict with the opinion rendered in *Missouri - Kansas - Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.,* No. 10219, 10220, March 26, 1951, rendered by the same court (C. A. 7), on the same day the opinion was rendered in the instant case and also conflict with the opinion rendered in *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 525, 534 (C. A. 8)?

3. Did the Court of Appeals, in the instant case, in its construction of Section 3, First (j) of the Railway Labor Act, have the power and authority to substitute by interpolation the words "reasonable actual notice", "formal notice" or "knowledge" in lieu of the plain provision of said Section 3, First (j), which requires that "The Board shall give due notice of al hearings and opportunity for the employee or employees to be heard"?

4. Did the Court of Appeals err in holding that the District Court erred in holding that the offer of proof by Respondents was insufficient in law as a defense under the pleadings?

5. The District Court, after a full hearing on the sole issue involved in the case, i. e., that the award was void as to the petitioners, for the failure of the Board to give due notice of all hearings to the petitioners who were persons involved in the dispute, and afford them an opportunity to appear and be heard in person, by counsel, or by other representatives as they may respectively elect as required by Section 3, First (j) of the Railway Labor Act and that such proceeding was carried on in their absence and the District Court having made its finding of fact that the award was void and the Court of Appeals for the Seventh Circuit on appeal having affirmed the order of the District Court and held the award void, such holding by the District Court and the Court of Appeals for the Seventh Circuit became the law of the case and was it error for the Court of Appeals in the instant case to hold otherwise?

Reasons Relied Upon for Allowance of This Petition.

1. Direct conflict of Circuit Courts of Appeals upon the same question of federal law thereby creating a necessity in the preservation of uniformity of decisions in the Federal Courts as to the construction and application of Section 3, First (j).

2. The Seventh and Third Circuit Courts of Appeals have decided a question of federal law which we believe to conflict with the decision of this court in *Elgin, Joliet & Eastern Railway Co.* v. *Burley,* 325 U. S. 711; confirmed on hearing in *Elgin, Joliet & Eastern Railway Co.* v. *Burley,* 327 U. S. 661, in that the above Courts of Appeals of the Third and Seventh Circuits hold that the provision of the Railway Labor Act (Section 3, First (j) which provides:

> "The several divisions of the Adjustment Board *shall give due notice* of all hearings to the employee

or employees and the carrier or carriers involved in any disputes submitted to them",

need not be complied with, and that the party aggrieved may be held bound by an award of the Adjustment Board entered in a proceeding by the Board where the mandate of Section 3, First (j) of the Railway Labor Act has not been complied with, which holding is contrary to the decision of this court in *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U. S. 711, 734, which holds that (p. 738):

"* * * An award cannot be effective against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3, First (j)".

3. The Courts of Appeals of the Third and Seventh Circuits were not authorized to alter or amend Section 3, First (j) of the Railway Labor Act in holding that without regard to the fact that notice was not given as required by Section 3, First (j) to the aggrieved person, if the aggrieved person had in some way undisclosed, received some kind of "actual notice" or "knowledge" or "formal notice" that hearings were being conducted by the Board, that the aggrieved person would be bound by the hearings and affected by the award although he had not received "notice of all hearings by the Board" or appeared in the proceedings.

4. The Court of Appeals of the Seventh Circuit in the instant case exceeded its authority in holding that, although the issue was not raised in the trial court by the pleadings and the offer of proof was in "general terms" which pertained to the following defenses:

"(3) Plaintiff had actual notice of pendency before the National Railroad Adjustment Board of the dis-

> pute between the Santa Fe and the brakemen; that plaintiffs authorized the Santa Fe to represent them in their interest, and did not seek to intervene"

that the district court therefore was in error in refusing to receive evidence which might sustain the claim of the brakemen-defendants that plaintiffs adversely affected did have reasonable actual notice of all hearings before the Adjustment Board, or that they had authorized the Santa Fe to represent them in such proceedings.

5. Such construction of Section 3, First (j) of the Railway Labor Act, 48 Stat. 1189 (1934), 45 U. S. C. Par. 153 (1946), raises a very important question affecting the public in general and a large segment of society, and we believe this to be a question of first impression which has not been directly raised and decided by this Honorable Court in a proceeding of this kind and we submit it should be settled by this Honorable Court for future guidance.

6. That the Court of Appeals of the Seventh Circuit, in the instant case, in a previous decision having decided that the award involved in this proceeding was *void* and that the finding and decision of the District Court on an application for a preliminary injunction, after a full hearing and in accordance with *Nord* v. *Griffin,* 86 F. (2) 481, 484, having decided the only issue involved in the case, the decision of the Circuit Court of Appeals on the affirmance of the granting of the preliminary injunction became the law of the case and should not have been disregarded in deciding the identical question on the second appeal in the same case.

7. The Court of Appeals, having reversed the order and decree of the trial court, with directions to proceed in conformity with the opinion of the Court of Appeals, it is submitted, a ruling by the Supreme Court is fundamental to the further conduct of the case.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket No. 10254, *Obie Fauster Hunter, et al., Plaintiffs-Appellees* v. *The Atchison, Topeka and Santa Fe Railway Company, Defendant-Appellee, and C. D. Shepherd, et al., Defendants-Appellants,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated 4th day of June, 1951.

OBIE FAUSTER HUNTER, ET AL.,
Petitioners,

.....

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951.

No. .....

OBIE FAUSTER HUNTER, et al.,

Petitioners,

vs.

C. D. SHEPHERD, et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Opinions of the Courts Below.

The District Court did not render an opinion but made findings of fact (R. 327), conclusions of law (R. 334), and an Order and Decree for Permanent Injunction (R. 335).

The opinion of the Court of Appeals for the Seventh Circuit rendered March 26, 1951 (R. 370), is unreported.

The Court of Appeals for the Seventh Circuit affirmed the order for Temporary Injunction in this case in 171 F. 2d 594 (*Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Company,* cert. den. 337 U. S. 916).

Jurisdiction.

1. The date of the judgment sought to be reviewed is March 26, 1951, and Petition for rehearing was denied May 1, 1951.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are 28 U. S. C. Sections 1254 and 2101.

3. As set forth in the above cited statutory provisions, the Supreme Court of the United States has jurisdiction, by writ of certiorari granted upon the petition of any party, to review a judgment rendered in a United States Court of Appeals. The application for certiorari may be made within ninety days after entry of such judgment. This Court's jurisdiction to grant certiorari extends to a judgment reversing and remanding with directions, a decree of the District Court and in cases cited in this Petition under "Jurisdiction" (p. 10).

Statement of the Case.

A statement of the case already has been made in the preceding petition (pp. 3-10), which hereby is adopted and made a part of this brief.

Specification of Errors.

If the petition is granted, the petitioner will urge that the Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that the District Court erred in refusing to receive evidence which might sustain the claim of the brakemen-defendants that plaintiffs adversely affected had *reasonable actual notice* of all hearings before the Adjustment Board, which is contrary to and in conflict with the holding of this Court that, it is necessary that the *Board shall give*

due notice of all hearings to the employee or employees involved in any disputes submitted to them, as provided by Section 3 First (j) of the Railway Labor Act.

2. In holding that the petitioners, who had been found to be parties aggrieved by the award of the Adjustment Board, were bound by an award entered in a proceeding by the Board, where the mandate of Section 3, First (j) of the Railway Labor Act had not been complied with, which holding conflicts with a decision of the Court of Appeals for the Seventh Circuit rendered on the same day the opinion was rendered in the instant case and on the same point of law which was involved in both cases, namely the decision of *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.*, Nos. 10219, 10220, March 26, 1951, Court of Appeals for the Seventh Circuit and also is in conflict with *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 527, 534 (C. A. 8).

3. In holding, by interpolation in Section 3, First (j) of the Railway Labor Act, without regard to the admitted fact that no notice was given to the petitioners as required by said Section 3, First (j), by the Board of all hearings in the dispute in which petitioners were involved, that if the petitioners had in some way, undisclosed, received some kind of "actual notice", or "knowledge", or "formal notice" of the hearings, they would be bound by the award.

4. In holding that the District Court erred in refusing to receive evidence which might sustain the claim of the brakeman-defendants that the petitioners, who had been found to be adversely affected by the award, did have reasonable actual notice of all hearings before the Board or that they had authorized the Santa Fe to represent them in such proceedings, when no such question was raised by the pleadings in the trial court and no attempt was made

by the respondents to prove that the Board had complied with Section 3, First (j) of the Railway Labor Act or that the petitioners had voluntarily appeared or had been given an opportunity to be heard at any hearing.

5. In holding that the prior decision of the Court of Appeals for the Seventh Circuit, which affirmed the order of the District Court, in the instant case granting a temporary injunction, after full hearing and after findings of fact by the trial court, that the award in the instant case was void because the Board failed to comply with the mandate of Section 3, First (j) of the Railway Labor Act, was not the "law of the case".

Summary of Argument.

I.

The National Railroad Adjustment Board, First Division, did not have jurisdiction to render a valid award against the petitioners who were employees involved in the dispute submitted to it, where the Board failed to give due notice of all hearings and an opportunity to be heard in person, by counsel or by a representative authorized by them to appear on their behalf, as required by Section 3, First (j) of the Railway Labor Act (45 U. S. C. A. 153 (j)).

II.

The opinion rendered by the Court of Appeals in the instant case conflicts with the opinion of the same Court of Appeals rendered on the same day, involving the same proposition of law and conflicts with a decision rendered in the Eighth Circuit.

III.

The Court of Appeals in the instant case had no jurisdiction to interpolate in Section 3, First (j) of the Railway Labor Act, the words, "reasonable actual notice", "formal notice" or "knowledge" and substitute the interpolated words for the plain provision of Section 3, First (j) which requires that the Board shall give due notice of all hearings to the employees involved in the dispute submitted to the Board and afford said employees an opportunity to appear and defend.

IV.

The Court of Appeals erred in holding that it was error for the District Court to hold that the offer of proof by Respondents was insufficient in law as a defense under the state of the pleadings.

V.

Where an application for an interlocutory injunction requires a decision on the merits of the *sole point* in controversy, affirmance of the judgment by the Court of Review is the law of the case and is to be followed by the trial court.

ARGUMENT.

I.

The National Railroad Adjustment Board, First Division did not have jurisdiction to render a valid award against the petitioners who were employees involved in the dispute submitted to it, where the board failed to give due notice of all hearings and an opportunity to be heard in person, by counsel or by a representative authorized by them to appear on their behalf, as required by section 3 First (j) of the Railway Labor Act. (45 U. S. C. A. 153(j).)

The Act under consideration involves Section 3, First (j) of the Railway Labor Act (45 U. S. C. A. 153 (j)) which is as follows:

> "Parties may be heard either *in person,* by counsel, or by other representatives, as they may respectively elect, and the several divisions of the *Adjustment Board* shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them."

This court in *Elgin, Joliet and Eastern Railway Company* v. *Burley, et al.,* 325 U. S. 711, after a comprehensive decision, states (p. 734):

> "The proviso to Section 2 Fourth in terms reserves the right of 'an employee individually' to confer with management; and Section 3 First (j) not only requires the Board to give 'due notice of all hearings to the employee * * * involved in any dispute submitted' * * *, but provides for 'parties' to be heard 'either in person, by counsel, or by other representatives, as they may respectively elect'."

The District Court and the Court of Appeals have found that "no notice of any kind was given to the Petitioners by the Board or anyone else". It is urged that the statutory requirement as to notice being plain and unambiguous, a failure to follow the provision of the Statute renders any Award void as against the Petitioners.

In *Nord et al.* v. *Griffin,* 86 F. 2d 481, the Court of Appeals for the Seventh Circuit in a case identical with the case at bar, succinctly states the main issue involved as follows:

> (p. 484) "The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment."

The principle of law above stated has been followed in various jurisdictions: *Hunter* v. *Atchison, Topeka and Santa Fe Railway Company,* 171 F. 2d 594 (7th Cir. 1948), cert. den. 337 U. S. 916 (1949); *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 527 (8th Cir. 1950), cert. den. 340 U. S. 823 (1950), rehear. den. 340 U. S. 885 (1950); *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.,* Nos. 10219, 10220, opinion March 26, 1951, Court of Appeals, 7th Circuit.

The Missouri-Kansas-Texas Railroad Company, et al. v. *Brotherhood of Railway and Steamship Clerks, et al.,* Nos. 10219, 10220, decided March 26, 1951, Court of Appeals, 7th Circuit on page 2 of the opinion reported in Commerce Clearing House Labor Law Reports, volume 19, paragraph 66,264, states:

> "The trial judge concluded that it *was the duty of the Board* in the Clerks' dockets *to give notice of all hearings* to the Telegraphers and to all individual employees involved in the disputes and to hear their contentions as one dispute before making any awards or orders and, similarly, in the matter of the Telegraphers' claims, *it was the Board's duty to give notice* to and hear the Clerks and all employees involved, and that the carriers were entitled, in each case, to have those duties performed by the Board and, in failing to perform such duties, the Board violated the Railway Labor Act and denied the carriers due process of law."

In the recent case of *Mary Kirby et al.* v. *Pennsylvania Railway Company,* opinion rendered April 23, 1951, Case No. 10,290, Court of Appeals, Third Circuit, reported in Commerce Clearing House Labor Law Reports, volume 19, paragraph 66,310, the court, in dealing with the proposition of law quoted, states:

> "*The Board's authority to act is based upon the Statute.* Until the Statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearings and no opportunity to be heard before the Adjustment Board. A party is entitled to an Award that will protect it in the event that it complies."

The interpolation by the Third Circuit of the word "knowledge" will be discussed under point two of this argument.

We respectfully urge that this court grant to the petitioners the Writ of Certiorari in order that the question of the jurisdiction of the Adjustment Board to adjudicate the rights of an employee where there has been no com-

pliance with Section 3 First (j) of the Railway Labor Act which provides that the Board shall give due notice to all employees involved in a dispute submitted to it and afford an opportunity of such employee to appear in person, by counsel or an authorized representative and defend his rights, and that this court may hold that an Award entered by the Board where there has been no effort to comply with Section 3 First (j), is void as to the employee who may be adversely affected by the award.

We believe this question to be of sufficient importance in the application of the law to warrant a final determination by this court and also that it is a question of first impression on the issue involved and directly raised in the case at bar.

II.

The opinion rendered by the Court of Appeals in the instant case conflicts with the opinion of the same Court of Appeals rendered on the same day involving the same proposition of law and conflicts with a decision rendered in the Eighth Circuit.

The opinion in the instant case seems to depart from the prior decisions on the same proposition of law rendered in the Seventh and Eighth Circuits in this: That in *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.,* Nos. 10219, 10220, March 26, 1951, The Seventh Circuit, holds that it is the duty of the Board to give notice of all hearings to all individual employees involved in disputes and to hear their contentions as one dispute before making any awards or orders; that the same duty is imposed upon the Board to give the same kind of notice to the carrier; and that the carriers and employees are entitled, in each case, to have this duty performed by the Board, and that, in failing to

perform such duties, the Board violated the Railway Labor Act and denied the carriers due process of law.

In the instant case the Court, in its opinion rendered March 26, 1951 (R. 359) at page 368, holds: "We hold that all plaintiffs who were or could be adversely affected by the order or award, are entitled to *notice under the statute.* Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required." "* * * The statute requires the Adjustment Board to give due notice of all hearings to the employees involved in the dispute before it, and not merely notice of the fact that proceedings may be pending before the Board."

There is nothing in the statute describing the kind of notice which the Board is required to give; but, in the instant case, it is admitted that *no notice whatsoever was given by the Board* to any of the petitioners. However, the Court holds that the District Court was in error in refusing to receive evidence which might sustain the claim of the brakemen-defendants that plaintiffs adversely affected did have *reasonable actual notice* of all hearings before the Adjustment Board, etc.

It being conceded that *no notice of any kind* was given or was claimed to have been given by the Board, and the secretary of the Board having testified that he did not give notice of any kind to the petitioners, the statement by the Court of Appeals that the brakemen-defendants were entitled to offer evidence that *reasonable actual notice of all hearings* had been given, was a requirement not contained in Section 3 First (j) of the Railway Labor Act and not raised as a defense by the brakemen-defendants in the trial court, conflicted with the decision of this Court in *Elgin, Joliet and Eastern Railway Company* v. *Burley, et al.,* 325 U. S. 711, at page 734, as quoted above in para-

graph 1 of this argument. Such holding also conflicts with the opinion of the same Court rendered on the same day of the rendition of the opinion in the instant case in *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.,* Nos. 10219, 10220, which holds, that the failure of the Board to give *due notice of all hearings* to all individual employees involved in the dispute, as required by said Section 3, First (j), was a violation by the Board of the Railway Labor Act and denied due process of law.

It is conceded and admitted that the Board in the instant case did not give any notice to the petitioners and that the petitioners did not appear at any of the hearings.

The case of *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 525, 534, decided by the Court of Appeals of the Eighth Circuit, held that an award was void as against an employee to whom the Board did not give notice of all the hearings as required by Section 3, First (j), said employees having been involved in the dispute. In the instant case the trial court and the Court of Appeals had held that petitioners would lose their positions by the award unless the enforcement was restrained by an order of Court.

In the Third Circuit, the Court of Appeals in *Kirby* v. *Pennsylvania Railway Company,* decided April 23, 1951, although holding that the Adjustment Board would have no authority to enter an award against an employee involved in a dispute submitted to the Board, without the statutory notice having been given to such employee and an opportunity afforded him to appear and defend, did also add in said opinion that the term "knowledge" may be substituted for the statutory notice and therefore it conflicts with the holding of the Courts of Appeals of the Seventh and Eighth Circuits, which cases hold that the

statutory notice must be given in order to give the Adjustment Board jurisdiction to adjudicate the rights of an employee involved in a dispute. The cases of the Seventh and Eighth Circuits as herein referred to are fully stated under Point I of this Argument.

It is respectfully requested that this Court grant the Petition for Certiorari in order that this conflict may be settled and uniformity be required in all federal courts respecting the jurisdiction of the Adjustment Board to adjudicate on the rights of employees who have not been given due notice of all hearings and an opportunity to be heard as required by Section 3, First (j) of the Railway Labor Act.

III.

It is contended by the petitioners that the Court of Appeals in the instant case had no jurisdiction to interpolate in Section 3 First (j) of the Railway Labor Act, the words "reasonable actual notice", "formal notice" or "knowledge" and substitute the interpolated words for the plain provision of Section 3 First (j) which requires, that the Board shall give due notice of all hearings to the employees involved in the dispute submitted to the Board and afford said employees an opportunity to appear and defend.

The Petitioners urge that the provision of the Statute (Section 3 First (j) of the Railway Labor Act), is plain, concise and is not ambiguous. When Congress used the language that the several divisions of the Adjustment Board *shall give due notice of all hearings to the employee or employees* . . . involved in any dispute submitted to them and that parties may be heard either *in person,* by counsel or by other representatives, as they may respectively elect, it meant exactly what it said and if Congress had intended that the words "reasonable actual notice",

"formal notice" or "knowledge" could be substituted for the phrase "due notice of all hearings should be given by the Board", language more aptly designed to express its requirements was readily available and was essential for that purpose.

We believe it only necessary to say that this court in *Bates* v. *Brown,* 72 U. S. 710, in holding that the language of the legislature is the Supreme Court's guide to the meaning of legislation in enacting a statute, at page 718 stated:

> "The intention of the legislature constitutes the law. That intention is manifested alike by what they have said and by what they have omitted to say. Their language is our guide to their meaning and under the circumstances we can recognize none other. We cannot go further than they have gone. The Plaintiff in Error, asks us, in effect, to interpolate into the Statute, a provision, which it does not contain. Were we to do so, we should assume the function of the legislature and forget that of the court. The limit of the law is the boundary of our authority and we may not pass it."

We believe it unnecessary to discuss the kind of notice required by law to be given by the Board, as by the case at bar no notice of any kind was given by the Board, and it is respectfully submitted that the Court of Appeals had no authority to interpolate into the law the above quoted words now complained against by your petitioners.

IV.

The Court of Appeals erred in holding that it was error for the District Court to hold that the offer of proof by Respondents was insufficient in law as a defense under the state of the pleadings.

This action was a suit in equity under the Court's general jurisdiction to set aside a void award of the Railroad Adjustment Board. And as stated in *Nord et al.* v. *Griffin,*

86 F. 2d 481, at page 484 (C. A. 7) "The trial below and this appeal . . . solely involve the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment."

That court further held, quoting from *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139:

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In the first place the proposed offer of proof did not contain any offer of evidence supporting any defense to the undisputed charge in the verified complaint (R. 35, 36, par. 24 (a)).

> "No notice of any kind was given to the plaintiffs or any member of the class to which the plaintiffs belong of the filing of the petition, complaint or other communication submitting to National Railroad Adjustment Board, First Division, the question attempted to be determined in said Order and Award. No notice of any kind was given to the plaintiffs, as aforesaid, of petition, complaint or other communication relating to the alleged dispute or of the time of said hearing; plaintiffs were neither represented nor afforded an opportunity to be represented either in person, by counsel, or by other representatives as by subsection (j) of Section 3, of the Act of June 21, 1934, specifically required."

To this allegation the Respondents in their answer (R. 79, par. 24) in part, state . . .

> ". . . that these defendants reiterate their denial that the plaintiffs were entitled to any notice of the

hearing before the National Railroad Adjustment Board. . . ."

The offer of proof (R. 134-154), consisting of twenty pages of recitals, did not contain any offer to prove that the Board had given due notice to the petitioners or any of them as required by Section 3 First (j) of the Railway Labor Act. It contained matters which were not relevant, material or competent, which lack of relevancy, materiality and competency appeared on the face of the offer of proof. This alone, was sufficient to render the entire offer inadmissible and as stated in 53 Am. Jur., Sec. 99, p. 88, where the question of an offer of proof is treated it is stated:

> "As a general rule, a party offering evidence must show its relevancy, materiality, and competency . . . the materiality and relevancy of an offer of evidence must be apparent when the offer is made. . . . The mere making of an offer of proof which is palpably inadmissible may constitute misconduct . . . and offer of evidence, which embraces irrelevant and prejudicial matter may be rejected as a whole. *Morris* v. *E. I. DuPont de Nemours & Co.,* 346 Mo. 126, 132, 139 S. W. (2d) 984, 129 A. L. R. 352. Where a part of an entire offer of evidence is inadmissible, the whole may be properly excluded. *Lohsen* v. *Lawson,* 106 Vt. 481, 174 A. 861, 95 A. L. R. 309. See Rule 43 (c) Rules of Fed. Proc."

The pleadings of the Respondents did not allege that the plaintiffs authorized the Santa Fe to represent their interests and it having been admitted by the pleadings that no notice was given by the Board as required by Section 3 First (j), and that no opportunity was given the petitioners to appear and defend their rights, it must be taken, upon the pleadings that no issue was involved in the trial court concerning the Santa Fe having been appointed as a representative of the petitioners (Fed. Rules Civ. Proc. Rule 56 (c)). No denial having been made by the Respondents of the allegations of the Complaint concerning the total

lack of notice by the Board, any defense of this kind was waived (Rule 12 (h), Fed. Rules of Civ. Proc.) and the Court of Appeals erred in reversing the District Court, as no issue had been presented to the trial court by the pleadings and therefore no such evidence was admissible.

We believe it is unnecessary to further elaborate the insufficiency of the offer of proof as being admissible by the trial court.

V.

Where an application for an interlocutory injunction requires a decision on the merits of the sole point in controversy an affirmance of the judgment by the Court of Review is the law of the case and is to be followed by the trial court.

In the instant case the sole point in controversy was the validity of Award No. 6640. On the application for an interlocutory injunction, there was a full hearing on this point and evidence was introduced by all parties to the suit, both oral and documentary. The witnesses were subjected to direct and cross-examination in open court. The secretary of the Board, T. S. McFarland, testified that he only notified the Atchison, Topeka and Santa Fe Railway Company and the Brotherhood of Railroad Trainmen; and that his record of the proceedings before the Board did not show that any other person was notified by the Board of the proceedings which resulted in Award 6640, Docket 7400 (R. 209). Mr. S. C. Kirkpatrick testified that he was assistant to the vice president of the Atchison, Topeka and Santa Fe Railway Company (R. 174, 175) and was the highest officer of the Company having charge of appeals of grievances arising out of collective bargaining agreements; that since 1941 he had occupied his present posi-

tion and was familiar with Award No. 6640 entered by the Adjustment Board. He further testified that if the restraining order had not been issued by the Trial Court, the Company would have complied with the Award (R. 187, 188), and that the wages and working conditions of the petitioners would have been changed. The Court, after hearing all the evidence, made a finding that Award 6640 was void as to the petitioners because no notice had been given by the Board to the petitioners who were employees involved in the dispute, as required by Section 3, First (j) of the Railway Labor Act (R. 253, 258, 259). On appeal by the respondents, the Court of Appeals for the Seventh Circuit, in *Hunter* v. *The Atchison, Topeka and Santa Fe Railway Company,* 171 F. 2d 594, affirmed the order of the trial court and also held that the award was void because of the failure of the Board to give the petitioners notice of all hearings and an opportunity to be heard, as required by said Section 3, First (j) of the Railway Labor Act.

We concede that under ordinary circumstances, in a case where a temporary injunction is granted on the pleadings and the trial court does not decide the sole point involved in the case, an affirmance of the order granting the interlocutory injunction is not to be held conclusive or to be considered as the "law of the case". But that is not the situation in the instant case.

Radio Corporation of America v. *De Forest Radio Co.,* 47 F. 2d 606, sustains the views urged by the petitioners that where a preliminary injunction rests solely on a question of law, the affirmance thereof, becomes the law of the case. In the last cited case, a temporary injunction was issued in the trial court in which Section 9 of a contract was declared void as in violation of the Clayton Act. The trial court held this section void. *Lord et al.* v. *Radio Corporation of America,* 24 F. 2d 265. On appeal from the

decree awarding the preliminary injunction, there was an affirmance by the Court of Appeals for the Third Circuit. *Radio Corporation of America* v. *Lord, et al.,* 28 F. 2d 257. The case came on for final disposition in the District Court and a permanent injunction was issued. *Lord* v. *Radio Corporation of America,* 35 F. 2d 962. On appeal to the Court of Appeals from the decree for the permanent injunction, the case was affirmed and the Court in a brief opinion states (p. 606):

> "As we view it, two questions are here involved: First, will this court adhere to the conclusions announced in 28 F. (2d) 257; and, second, were there any facts developed on final hearing in the court below which would lead the court to now hold that while the contract was unlawful, it had not had the working effect of creating a monopoly.
>
> On the first question this court declines to re-examine and reverse its views as expressed in its opinion already reported at 28 F. (2d) 257, etc."

In the case at bar on the application for preliminary injunction the trial court had a full hearing concerning the validity of the award which was the only question in issue as heretofore stated by this court in *Nord* v. *Griffin,* 86 F. (2d) 481, 484.

In the case at bar the only question involved was the validity of Award No. 6640. A disposition of this question by the trial court in finding the award void, and the affirmance of the decree by the Seventh Circuit whose opinion again declared the award void, warranted the trial court in following the decision of the Court of Appeals by issuing the permanent injunction. The matter having been decided on appeal by affirmance of the finding and decree of the trial court that the award was void, the Court of Appeals should not review its own decision in this proceeding.

The trial court (R. 160) set the case down for final hearing and offered to hear any evidence presented on the sole issue in the case, i. e.: Whether or not the Board had given notice as required by Section 3, First (j) to the petitioners, of all hearings, as petitioners were employees involved in the dispute. The respondents at no time offered any evidence to show that the situation had changed since the hearing on the temporary injunction and further failed to show any cause why the temporary injunction should not have been made permanent. It was not error for the trial court to make the temporary injunction permanent, based upon the findings on the merits during the hearing on the application for the temporary injunction. It was error for the Court of Appeals to hold that the final decree of the trial court should be reversed and the case remanded because of the trial court's failure to admit evidence on a question of law which was not raised by the pleadings and which did not pertain to the only question in issue, i. e.: That the Board failed in its duty to give due notice to the petitioners involved in the dispute, of all hearings, and to afford the petitioners an opportunity to appear and defend, as required by Section 3, First (j) of the Railway Labor Act. The Board, in failing to perform such duty, violated the Railway Labor Act and denied the petitioners due process of law in violation of the Fifth Amendment of the United States Constitution. *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.,* Nos. 10219, 10220 (C. A. 7), March 26, 1951, not yet officially reported.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated June 4th, 1951.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 99

OBIE FAUSTER HUNTER, ET AL.,
Petitioners,

vs.

C. D. SHEPHERD, ET AL.,
Respondents.

BRIEF OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, DEFENDANT-RESPONDENT, IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI AND IN RESPONSE TO THE BRIEF SUPPORTING SAID PETITION.

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June 30, 1951.

INDEX.

TABLE OF CASES. PAGE

Brotherhood of Railroad Trainmen v. Templeton, (C. A. 8) 181 F. 2d 527 (1950) certiorari denied, 340 U. S. 823 2

Hunter v. The Atchison, Topeka and Santa Fe Railway Co., (C. A. 7) 171 F. 2d 594 (1948) certiorari denied, 337 U. S. 916 2

Hunter v. The Atchison, Topeka and Santa Fe Railway Co., et al., (C. A. 7) 188 F. 2d 294 (March 26, 1951).. 2

Kirby v. Pennsylvania Railroad Company, (C. A. 3) 188 F. 2d 793 (1951)..... 2

Missouri-Kansas-Texas Railroad Company, et al. v. Brotherhood of Railway and Steamship Clerks, et al., (C. A. 7) 188 F. 2d 302 (1951)..... 2

STATUTES.

Railway Labor Act:
Section 3 First (j) (45 U. S. C. A. Sec. 153, First (j)) 2

MISCELLANEOUS.

Supreme Court Practice (1950) Stern and Gressman.. 1

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To the Honorable Fred A. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

On page 197 of *Supreme Court Practice,* 1950, by Stern and Gressman, it is said:

> "Where there is a clear conflict of decisions, or where the question is undoubtedly of such importance as to need a Supreme Court determination, the respondent may have no reasonable basis for opposing certiorari. A brief statement of the reasons why he does not oppose is all he need file."

Manifestly the conflict between the decisions of the Third, Seventh and Eighth Circuits, as described by petitioners cannot be contradicted. The Seventh Circuit in its first opinion in *Hunter* v. *The Atchison, Topeka and Santa Fe Ry. Company, et al.*, 171 F. 2d 594 (1948), certiorari denied, 337 U. S. 916, held that the National Railroad Adjustment Board must comply with the statutory command contained in Section 3 First (j) of the Railway Labor Act and that if the Board fails to comply with the statute in that regard, the award of the Board will be void as to the parties so entitled to notice of hearing. The Eighth Circuit so held in *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (1950), certiorari denied, 340 U. S. 823. On March 26, 1951 in *Missouri-Kansas-Texas Railroad Company, et al.* v. *Brotherhood of Railway and Steamship Clerks, et al.*, 188 F. 2d 302, the Seventh Circuit affirmed the Trial Court's holding that in failing to perform the duty of giving the notice prescribed by the Railway Labor Act the Board violated that statute.

On the second appeal of the *Hunter* case the Seventh Circuit held, without prescribing any standards or specifications, that other notice or knowledge could be substituted for the specific language of the statute concerning the duty of the Board to give due notice of hearings. *Hunter* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, 188 F. 2d 294 (March 26, 1951). In like manner the Third Circuit held in *Kirby* v. *Pennsylvania Railroad Company*, 188 F. 2d 793 (1951), that the notice of hearing prescribed in Section 3 First (j) of the Railway Labor Act need not be given by the Adjustment Board if the parties entitled to such notice have some knowledge of the proceedings before the Board or have some other kind of notice concerning the dispute to be heard by the Board.

This respondent believes that the instant petition for cer-

tiorari fits the above quotation from Supreme Court Practice and that, therefore, there is no reasonable basis for opposing certiorari.

Accordingly, this respondent respectfully prays that the writ be granted.

Respectfully submitted,

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June 30, 1951.

3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 99

OBIE FAUSTER HUNTER, ET AL.,
Petitioners,

vs.

C. D. SHEPHERD, ET AL.,
Respondents.

BRIEF OF C. D. SHEPHERD, ET AL., DEFENDANTS-RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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July 7, 1951.

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INDEX.

PAGE

Statement of the Case 1

Questions Presented 4

Summary of Argument 5

Argument 6

I. The Proceeding Below is at an Interlocutory Stage, and Petitioners Have Not Shown Any Unusual Circumstances Which Would Justify a Piecemeal Review of the Case 6

II. Petitioners Have Failed to Show That the Decision of the Court of Appeals Sought to be Reviewed Conflicts With Decisions of This Court or of Other Circuits 8

III. Answer to Petitioners' Argument That the Brakemen-Respondents Admitted That Petitioners Had No Notice of Any Kind 12

IV. Answer to Petitioners' Argument That the Preliminary Injunction Order Decided the Case on the Merits 14

Conclusion 15

Table of Authorities.

Cases.

Brotherhood of Railroad Trainmen v. Templeton, 8th Cir. (1950), 181 F. 2d 527 ..... 2, 10

Elgin, Joliet & Eastern R. Co. v. Burley, 327 U. S. 661 ..... 5, 8, 9

Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251 ... 6, 7

Hunter v. Atchison, T. & S. F. Ry. Co. (1948), 171 F. 2d 594, certiorari denied 337 U. S. 916 2

Hunter v. Atchison, T. & S. F. Ry. Co. (1951), 188 F. 2d 294 ..... 1, 9

John Simmons Co. v. Grier Brothers Co., 258 U. S. 82 7

Kirby v. Pennsylvania R. Co. (1951), 188 F. 2d 793 .. 11, 12

Missouri-Kansas-Tex. R. Co. v. Brotherhood of R. & S. S. C. (1951), 188 F. 2d 302 ..... 10, 11

Rogers v. Hill, 289 U. S. 582 14

United States v. United States Smelting, R. & M. Co., 339 U. S. 186 14

United States Alkali Exp. Asso. v. United States, 325 U. S. 196 7

Statute.

Railway Labor Act, Section 3, First (j), 45 U. S. C. A. Sec. 153, First (j) 8, 9, 10

Rule.

Rules of the Supreme Court of the United States, Rule 38 11

IN THE

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BRIEF OF C. D. SHEPHERD, ET AL., DEFENDANTS-RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The opinion of the Court of Appeals for the Seventh Circuit is reported in *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, (1951) 188 F. 2d 294. Petitioners' statement appearing at pages 3-10 of their petition is in large measure a paraphrase of portions of the Court of Appeals' opinion, with certain departures and omissions. The more serious of these are briefly mentioned in the summary which follows.

This is an action for an injunction, brought by petitioners on behalf of all members of their alleged class of railroad porters and chair car attendants, to prohibit dis-

turbance of their employment in such positions, which disturbance petitioners allege will result if an award of the National Railroad Adjustment Board is enforced (R. 4-45). The award was in favor of certain brakemen, allowing wage claims as damages for past violation, as the Board found, of a contract made by the Brotherhood of Railroad Trainmen on behalf of brakemen with the carrier, The Atchison, Topeka and Santa Fe Railway Company (R. 324-325). The violation found by the Adjustment Board consisted of assigning porters to do certain braking work, notwithstanding the requirement of the brakemen's contract, as interpreted by the Board, that all such work be assigned to brakemen. However, the Board expressly limited its award and order to the allowance of wage claims for past contract violations, and did not order that the porters or any other employees be displaced (R. 60, 324-325). Therefore petitioners' statement at page 3 of their petition that the disputed work was "awarded" to brakemen is hardly accurate.

The petitioners are employees at will, and have no written contract of employment.

The defendants are, in addition to the employer, the Adjustment Board and certain individuals allegedly representing the Santa Fe brakemen as a class (R. 5-8). A preliminary injunction was granted February 6, 1948 (R. 259-260), and was affirmed by the Court of Appeals for the Seventh Circuit. *Hunter* v. *Atchison T. & S. F. Ry. Co.* (1948), 171 F. 2d 594, certiorari denied, 337 U. S. 916.

On remandment to the trial court after affirmance of the preliminary injunction, the case came on for final hearing on petitioners' application for a permanent injunction. The district court adopted the theory that the preliminary injunction and its affirmance on appeal disposed of the merits of the case, and that a permanent injunction

should issue without hearing any further evidence (R. 97). Thus the district court did not require the petitioners to put in any additional evidence (R. 129-133), and rejected all evidence offered by the brakemen-respondents (R. 155-156).

The principal ground relied on by petitioners for an injunction is their allegation that they received no notice of any kind of the Adjustment Board proceeding (R. 35). The brakemen-respondents contend that the employment rights of petitioners were not adjudicated by the Board, but that petitioners had actual knowledge of the Adjustment Board proceeding, acquiesced in the position being taken by the Santa Fe in opposition to the wage claims of the brakemen, and authorized the Santa Fe to represent their alleged interests in defending against the brakemen's claims (R. 76-77, 79). At the final hearing the brakemen offered to prove such knowledge, acquiescence and authorization (R. 144-147), but their offer was rejected by the district court (R. 155-156).

On appeal by the brakemen from the permanent injunction order the Court of Appeals for the Seventh Circuit reversed, holding that the preliminary injunction and its affirmance on appeal did not determine the merits of the case, and that the district court erred in rejecting evidence as to actual knowledge on the part of petitioners as to the pendency of the Adjustment Board proceedings, and in rejecting evidence as to authorization of the Santa Fe by petitioners to represent them in such proceedings (R. 359-369).

Petitioners omitted from their statement the fact that in remanding the case to the district court, the Court of Appeals directed that the preliminary injunction order be reinstated pending further order of the district court (R. 369).

QUESTIONS PRESENTED.

1. Whether, in view of the decision of the Court of Appeals directing that the case be remanded for trial on the merits, and that the preliminary injunction in favor of petitioners be reinstated, there are any unusual circumstances as would justify issuance of a writ of certiorari at this interlocutory stage in the proceedings.

2. Whether there is any conflict presented by the decision sought to be reviewed with decisions of this Court or of other circuits.

3. Whether the offer of proof made in the district court by the brakemen-respondents that petitioners knew of the Adjustment Board proceeding complained of, and authorized the carrier to represent them in that proceeding, should have been rejected on the ground that no such issue was made on the pleadings.

4. Whether the granting of the preliminary injunction order decided the merits of this case.

SUMMARY OF ARGUMENT.

I. The Court of Appeals has directed the reinstatement of the preliminary injunction in petitioners' favor and directed that the case proceed to a trial on the merits. Thus the case has not been finally disposed of below, and a review at this stage would not be determinative of the ultimate issues involved. Certiorari is not granted in such cases in the absence of unusual circumstances, none of which has been shown to exist in this case.

II. Petitioners have failed to show any conflict between the decision sought to be reviewed and any decision of this Court or of another circuit. The Court of Appeals, in holding that actual knowledge on the part of an employee who considers himself involved in an Adjustment Board proceeding and authorization by such employee to the carrier to represent him are pertinent to the question of whether such employee received "due notice" under Section 3, First (j) of the Railway Labor Act, has followed the reasoning employed by this Court in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 327 U. S. 661. Such holding is also in conformity with the applicable decisions of other circuits.

III. There is no basis in fact for the petitioners' assertion that the pleadings do not dispute their allegation that they had no notice of any kind. The answer of the brakemen-respondents specifically alleges actual knowledge, acquiescence, and authorization by petitioners to the carrier to represent them in the Adjustment Board proceedings.

IV. The decision of the Court of Appeals that the granting of the preliminary injunction and its affirmance on appeal did not decide the merits of the case is in harmony with the well established rule announced by this Court.

ARGUMENT.

I.

The Proceeding Below Is at an Interlocutory Stage, and Petitioners Have Not Shown Any Unusual Circumstances Which Would Justify a Piecemeal Review of the Case.

If petitioners' application for a writ of certiorari is not granted, a preliminary injunction in their favor will be reinstated and the case will proceed to a trial on the merits. One of the principal grounds for reversal of the permanent injunction order, as assigned by the Court of Appeals, was that the injunction was granted without a trial of the merits on the erroneous theory that the preliminary injunction was definitive of all issues (R. 363-365). The Court of Appeals specifically directed that certain evidence offered by the brakemen defendants was improperly rejected, *i. e.*, evidence on the question of actual knowledge of petitioners concerning the Adjustment Board proceeding during its pendency and their authorization of the Santa Fe to represent them before the Board (R. 368). It follows that this case has not been finally disposed of below, and that a review at this stage by this Court could hardly be determinative of the ultimate issues involved.

While we do not question the power of this Court to grant certiorari at an interlocutory point in the proceedings below, it is a well established principle that discretion to grant the writ is sparingly exercised in such cases, inasmuch as review on writs of certiorari was not designed to permit piecemeal reviews merely to serve the convenience of a party in the further conduct of the litigation.

In *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251,

at 258, this Court said that "except in extraordinary cases, the writ is not issued until final decree", and that where the decree sought to be reviewed was not a final one, that fact alone furnished a sufficient ground for the denial of the application. On the same point this Court, in *John Simmons Co.* v. *Grier Brothers Co.*, 258 U. S. 82, at page 91, said:

> "That mode of review is not a right of the party, but lies in this court's discretion; peradventure the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ."

In *United States Alkali Exp. Asso.* v. *United States*, 325 U. S. 196, at 202-203, this Court cites the policy "to avoid piecemeal reviews" by limiting certiorari and other extraordinary writs to appeals from final judgments, and that even though a hardship is imposed on the party who is compelled to await the correction of an alleged error made at an interlocutory stage by an appeal from a final judgment, that "does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review".

In this case, petitioners, having been granted reinstatement of their preliminary injunction by the direction of the Court of Appeals, can hardly maintain that certiorari is essential to the protection of their interests in the further conduct of this litigation. In fact they do not attempt to show that any hardship will result if the review sought is not granted at this time. We submit that denial of the writ is fully justified under the authorities above cited.

II.

Petitioners Have Failed to Show That the Decision of the Court of Appeals Sought to Be Reviewed Conflicts With Decisions of This Court or of Other Circuits.

Petitioners seem to rely largely on their contention (Petitioners' Brief, pp. 22-30) that the decision of the Court of Appeals is in direct conflict with those of other circuits, as well as the decision of this Court in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 327 U. S. 661. The asserted conflict concerns the question whether the "due notice" required by Section 3, First (j) of the Railway Labor Act (45 U. S. C. A. Sec. 153, First (j)) to be given employees involved in Adjustment Board hearings means a formal notice which only the Board may give, or whether actual knowledge or some other form of notice may suffice.

Considering first the asserted conflict with this Court's decision, we think it is clear that to the extent applicable, the Court of Appeals has fully recognized and applied the reasoning of this Court in the *Burley* case. That case involved a question of union representation of the rights of individual employees in a dispute which was submitted to the Adjustment Board and later settled by negotiation between the union and the employer. Speaking of the knowledge or notice an employee normally has concerning his grievances, this Court said (327 U. S. 661, at pp. 666-667):

> "In view of these facts there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted or, if they fail, that proceedings are pending before the Board to dispose of it. Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done

> so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights."

In the same case this Court, commenting on the requirement of "due notice" contained in Section 3, First (j) of the Railway Labor Act, said (at page 666, footnote 9):

> "But we did not undertake to define what was meant by 'due notice,' nor do we now. 'Due notice' conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency."

We believe the above-quoted language of this Court, all of which was referred to by the Court of Appeals in the instant case, is in substantial agreement with the opinion of the Court of Appeals in its holding as follows (188 F. 2d at page 301):

> "We hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity, and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him."

Turning now to the decisions of Circuit Courts which petitioners assert are in conflict with the instant decision, the only one allegedly in conflict which has been decided by a circuit other than the Seventh is *Brotherhood of Railroad Trainmen* v. *Templeton,* 8th Cir. (1950), 181 F. 2d 527. In that case certain employees were granted an injunction against enforcement of an Adjustment Board award on the ground that their employment rights were thereby affected without notice, but the case does not hold that an employee with actual knowledge of an Adjustment Board proceeding or who has authorized the carrier to represent him may complain that he did not receive formal notice from the Board. As a matter of fact the opinion of the Eighth Circuit does not discuss the point of actual knowledge or representation. The decision in the *Templeton* case, insofar as notice is concerned, is based on the finding of the district court, approved by the Court of Appeals, as follows (181 F. 2d 527, at page 531):

> "Plaintiff and no members of the class he represents in this instant action, nor the Brotherhood of Railway & Steamship Clerks Etc. Union, were given any notice by the Santa Fe, the Brotherhood of Railroad Trainmen or the National Railroad Adjustment Board, of the pendency of such protest proceeding before the National Railroad Adjustment Board," * * *.

We think it necessarily follows that the *Templeton* case is not authority for the proposition that formal notice by the Adjustment Board of its proceedings is the minimum statutory requirement under Section 3, First (j) of the Railway Labor Act, and that petitioners in this case have failed to show any conflict between that decision and this one.

Petitioners also contend that the decision in the instant case by the Seventh Circuit is in direct conflict with a decision by the same Court, rendered on the same day, in

Missouri-Kansas-Tex. R. Co. v. *Brotherhood of R. & S. S. C.* (1951), 188 F. 2d 302. As written, Rule 38 of this Court apparently does not contemplate the granting of certiorari to resolve an asserted conflict within a single circuit, but we think it is easily demonstrable that no such inner-struggle exists here. In the *M.K.T.* case the principal question involved was whether the Adjustment Board should, in a single proceeding, hear the claims of two classes of railroad employees, each working under a separate agreement under which the right to the same work is asserted. The Court held that the Board does have such authority, and that notice should be given to each group of the claims being made by the other. That case does not involve the question of an employee's actual knowledge of Adjustment Board proceedings, nor does it involve the question of his authorization of the carrier to represent him. It follows that there is no basis for petitioners' contention that the Seventh Circuit has decided the same matter in two ways.

As a final case in connection with their argument as to inter-circuit and intra-circuit conflict, petitioners cite the decision of the Third Circuit in *Kirby* v. *Pennsylvania R. Co.* (1951), 188 F. 2d 793. Curiously, the point petitioners make concerning the *Kirby* decision seems to be that it is not in conflict, but in *agreement* with the decision in the instant case (Petitioners' Brief, pp. 27-28). In the *Kirby* case, which was a suit to enforce an Adjustment Board award, the defendant carrier contended that the award was void for lack of notice to certain employees allegedly affected by the award. The Court of Appeals remanded the case for evidence on this point, and said (188 F. 2d at p. 800):

> "On remand the trial court may hear evidence on the question of what employees, if any, would have been replaced by defendant's compliance with the

> Board's order, and whether they received notice or had knowledge of the proceedings. Then the court can determine whether these employees had such an interest as entitled them to notice of the Board hearing, and whether they received it or the equivalent."

We agree that there is no conflict between the *Kirby* case and this case, and submit that both have followed the reasoning of this Court in the *Burley* decision. We further submit that petitioners have disclosed no conflict on which certiorari is warranted.

III.

Answer to Petitioners' Argument That the Brakemen-Respondents Admitted That Petitioners Had No Notice of Any Kind.

At pages 29-32 of their brief, petitioners argue that the offer of proof made by the brakemen respondents concerning actual knowledge on the part of plaintiffs and their authorization of the Santa Fe to represent them before the Board should have been rejected on the ground that no such issue was made by the pleadings, which, according to petitioners, do not dispute the allegation of petitioners that they had "no notice of any kind" (Petitioners' Brief, p. 30).

This argument is predicated on a serious distortion of the facts as shown by the record, and we shall not refute it further than to quote from the pertinent portions of the answer filed by the brakemen-respondents in the district court. The brakemen-respondents alleged, in part, as follows (R. 76):

> "14. * * * these Defendants are informed and believe, and so believing allege the fact to be that the Plaintiffs had knowledge of the proceedings before the

National Railroad Adjustment Board which culminated in the entry of the Order and Award of April 20, 1942, and that they likewise had knowledge of the fact that the Railroad presented for the consideration of the members of the Board and the Referee appointed by the National Mediation Board to sit as a member of said Adjustment Board in consideration of said case, all of the contentions now being made by the Plaintiffs with respect to their supposed rights to perform the services of brakemen at the head end of passenger trains. Further answering, these Defendants allege the fact to be that the Plaintiffs, well knowing of the pendency of the action before the National Railroad Adjustment Board, failed and neglected to intervene therein, but on the contrary acquiesced in the presentation of their position by the Railroad and its representatives. * * *"

The answer further alleges, in part, as follows (R. 79):

"24. * * * these Defendants reiterate their denial that the Plaintiffs were entitled to any notice of the hearing before the National Railroad Adjustment Board, and in the alternative, on information and belief, allege that the Plaintiffs had actual notice of the proceedings before said Board and that their position as set forth in their Complaint was fully presented in their behalf by the Railroad. * * *"

We submit that petitioners' position concerning the offer of proof is obviously untenable.

IV.

Answer to Petitioners' Argument That the Preliminary Injunction Order Decided the Case on the Merits.

The final point made by petitioners is that the granting of the preliminary injunction and its affirmance on appeal decided the merits of this case. We believe that the opinion of the Court of Appeals, which holds otherwise, adequately disposes of this point in conformity with well established principles (R. 363-365). However, we note that petitioners again argue, as they did in the Court of Appeals, that there was a "full hearing" on the application for a preliminary injunction (Petitioners' Brief, p. 32). It is possible to infer from this assertion that there was a stipulation entered into that the evidence received at the hearing on the preliminary injunction would stand as proof on the merits. The fact is the opposite. The record shows that it was made clear through statements of both court and counsel at the preliminary hearing that a full hearing on the merits was to follow (R. 134-135) and petitioners successfully urged that the scope of the inquiry at the preliminary hearing should be limited (R. 194-196).

As for the point of law involved, this Court has often held that a preliminary injunction, whether appealed or not, is not determinative of the merits and does not become the law of the case. *Rogers* v. *Hill,* 289 U. S. 582. *United States* v. *United States Smelting, R. & M. Co.,* 339 U. S. 186. In the instant case the Court of Appeals has followed the same rule.

Conclusion.

We believe that petitioners have failed to establish any sound basis for the granting of a writ of certiorari in this case, and that their petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 99

OBIE FAUSTER HUNTER, et al.,
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vs.

C. D. SHEPHERD, et al.,
Respondents.

REPLY BRIEF OF OBIE FAUSTER HUNTER, ET AL., PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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August 22, 1951.

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INDEX.

PAGE

Introduction 1-2

Argument 3-15

I. Reply of Petitioners to Respondents' Contention that this Application for a Petition for Writ of Certiorari Fails to Show any Unusual Circumstances 3-5

II. Petitioners' Reply to Respondents' Argument that Petitioners Have Failed to Show that the Decision of the Court of Appeals Sought to be Reviewed Conflicts with Decisions of this Court or of Other Circuits 5-6

III. Reply of Petitioners to Respondents' Argument that there was no Admission of the Failure of the National Railroad Adjustment Board to Give Notice as Required by Sec. 3, First (j), Railway Labor Act 6-10

IV. Reply of Petitioners to Respondent's Argument that the Decision of the Court of Appeals, Affirming the Order of the District Court which Granted the Interlocutory Injunction, After a Full Hearing, on the Validity of Award No. 6640 and Finding that the Award was Void, was not the "Law of the Case" 10-15

Conclusion 15

Table of Cases.

Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 F. 545, 19 C. C. A. 25 (C. C. A. 6) 13

Botany Worsted Mills v. U. S., 278 U. S. 282; 49 S. Ct. 129, 73 L. Ed. 379 7

Brotherhood of Railroad Trainmen v. Templeton, 181 F. (2d) 527, Cer. Den. 340 U. S. 823, Rehearing Den. 340 U. S. 885 ..... 8, 14

Brown v. Lanyon Zinc Co., 179 F. 309, 102 C. C. A. 497 14

Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U. S. 711 ..... 5, 6
Elgin, Joliet & Eastern Ry. Co. v. Burley, 327 U. S. 661 ..... 5, 6
Estes et al. v. Union Terminal Co., 89 F. (2d) 768 9
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 60 L. Ed. 629 .....3, 10, 12, 13
Hunter v. Atchison, Topeka & Santa Fe Railway Co., 171 F. (2d) 594, Cer. Den. 337 U. S. 916, 78 F. Sup. 934 .....8, 10, 11, 12
John Simmons Co. v. Grier Brothers Co., 258 U. S. 82, 42 S. Ct. 196 ..... 3, 6
Kirby v. Pennsylvania Railway Company, 188 F. (2d) 793 ..... 5, 9
Missouri-Kansas-Texas Railroad Co., et al. v. Brotherhood of Railway and Steamship Clerks, et al., 188 F. (2d) 302 ..... 5, 14
Nord v. Griffin, 86 F. (2d) 481, Cer. Den. 300 U. S. 673 8
Obie Fauster Hunter, et al. v. Atchison, Topeka & Santa Fe Railway Co., etc. et al., 188 F. (2d) 294, Rehearing denied 1951 ..... 5, 9
The Railroad Yardmasters of North America, Inc. v. Chicago River Indiana Railroad Company, et al., 70 F. Sup. 915, Affirmed 166 F. (2d) 326 8
Rogers v. Hill, 289 U. S. 582, 77 L. Ed. 1385.....10, 11
Spiller v. Atchison, Topeka & Santa Fe Railway Company, 253 U. S. 117, 40 S. Ct. 466 5
United States v. United States Smelting, Refining & Mining Co. et al., 339 U. S. 186..... 11
United States Alkali Export Assn., Inc. v. United States, 325 U. S. 196..... 3
William Wrigley, Jr. Co. v. L. P. Larson, Jr., Co., 5 F. (2d) 731, D. C. N. D. Ill. E. D. 13, 14

CONSTITUTION AND STATUTES.

Constitution of the United States, Fifth Amendment .. 15

Railway Labor Act:

Section 3, First (j), (45 U. S. C. A. Sec. 153, First (j)).....4, 7, 8, 9, 10, 12, 14

Books and Miscellaneous Papers:

Letter, United States Railroad Retirement Board, August 7, 1951 9

Supreme Court Practice, Stern & Grassman (1950) 4

IN THE

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REPLY BRIEF OF OBIE FAUSTER HUNTER, ET AL., PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

(Note: Emphasis ours where used in this brief.)

MAY IT PLEASE THE COURT:

We have carefully considered the brief of C. D. Shepherd, et al., defendants-respondents hereinafter called respondents, in opposition to the petition for writ of certiorari and the brief in support thereof, and find that it raises a host of minor controversies over mere details but we have been unable to find in it answers to the major propositions of law tendered by the petitioners in their petition for writ of certiorari and the brief in support thereof.

These details we shall not attempt to meet, lest a particularized rebuttal by the petitioners, obscure the essential simplicity of the issues presented to this court for decision. We specifically desire to note that we do not consider the respondents correct on the issues which are not developed in reply. Instead we shall briefly call to the attention of this Honorable Court a few matters which we believe sufficient to close the pleadings.

We shall endeavor to avoid repetition although it may be necessary to call to the attention of this Honorable Court many misstatements of fact and fallacies of argument which we believe obviously appear in the brief of respondents, and briefly meet the propositions of law urged by the respondents and the material parts of their argument.

ARGUMENT.

I.

Reply of petitioners to respondents' contention that this application for a petition for writ of certiorari fails to show any unusual circumstances.

The cases cited by the respondents do not show any reason for the denial of the application by the petitioners for a writ of certiorari. In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 60 L. Ed. 629, a writ of certiorari was granted to review a decree of the court of appeals which reversed and remanded with directions a decree of the trial court and this Honorable Court states (60 L. Ed. 633) that a writ of certiorari may be granted "in cases of peculiar gravity and general importance, and in order to secure uniformity of decision". In *John Simmons Co.* v. *Grier Brothers Co.*, 258 U. S. 82, 42 S. Ct. 196, cited by the respondents, a writ of certiorari was granted and this Honorable Court reviewed the decision of the Circuit Court of Appeals.

In *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, cited by the respondents, certiorari was granted to review an order of the district court and this Honorable Court, on p. 204 states:

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

We are aware of the fact that this Honorable Court will not usually grant certiorari to review a non-final judgment, such as one remanding the case to the District Court for a new trial, etc. Supreme Court Practice, Stern & Gressman (1950) pp. 115, 116. However, we believe that there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which will otherwise qualify as a basis for certiorari.

Under Point III of this Reply, we have endeavored to fully set forth facts and circumstances showing a continued disregard by the National Railroad Adjustment Board of the provision of the Railway Labor Act, Section 3, First (j), which requires that the *Board shall give notice* to all employees who may be adversely affected by the proceedings. We have set forth the numerous cases of the various Courts of Appeals in which it has been specifically stated that, an award entered by the Board without a compliance with Section 3, First (j), of the Railway Labor Act is void. This case also involves an important jurisdictional question concerning the National Railroad Adjustment Board to enter a valid award against an employee adversely affecting his rights where the *Board has not given or attempted to give any notice* to such employee as required by Section 3, First (j), of the Railway Labor Act. We have also endeavored to show a conflict on a question of law existing under the decisions of the several Courts of Appeals and that this conflict will continue to exist unless this Honorable Court will exercise its discretion so as to bring about a uniformity in the application of Section 3, First (j), of the Railway Labor Act. We have also endeavored to show that the construction and interpretation of Section 3, First (j), of the Railway Labor Act is a question of first impression and in addition thereto is of such general interest throughout the United States to the million

or more employees of common carriers all of which we believe to be particular circumstances warranting consideration by this Honorable Court.

This Honorable Court, in *Spiller* v. *Atchison, Topeka and Santa Fe Railway Company*, 253 U. S. 117, 40 S. Ct. 466, in granting the writ of certiorari, states (p. 468):

> "However upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgment."

II.

Petitioners' reply to respondents' argument that petitioners have failed to show that the decision of the Court of Appeals sought to be reviewed conflicts with decisions of this court or of other circuits.

We believe that this Point has been fully covered in the Brief of the Petitioners accompanying the Petition for Writ of Certiorari (pp. 13, 14, 22, 26) and under Point III of this Reply Brief (pp. 6-10), therefore, repetition will be dispensed with. In view of the fact that several cases cited in Petitioners' original Brief did not give the Volume and Page reference, we respectfully submit the same:

Obie Fauster Hunter, et al. v. *Atchison, Topeka and Santa Fe Railway Company, etc., et al.*, 188 F. (2d) 294-301; (March 26, 1951).

Missouri-Kansas-Texas Railroad Co., et al. v. *Brotherhood of Railway and Steamship Clerks, et al.*, 188 F. (2d) 302, 304; (March 26, 1951).

Kirby v. *Pennsylvania Railway Company*, 188 F. (2d) 793-798, 799; (April 23, 1951).

We have fully discussed the case of *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711, 734, 738; *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 327 U. S. 661 and as stated in *John Simmons Co.* v. *Grier Brothers Co.*, 258 U. S. 82; 42 S. Ct. 196, 198:

> "Obviously the nature of the decree is to be determined by its own essential purport and effect, not by the statements of the pleaders about it."

Therefore, we shall not endeavor to make statements about the two cases of *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711 and 327 U. S. 661, the purport and effect of which are known to this Honorable Court.

III.

Reply of petitioners to respondents' argument that there was no admission of the failure of the National Railroad Adjustment Board to give notice as required by Sec. 3, First (j), Railway Labor Act.

The respondents have failed to show, under Point III (pp. 12-13) any denial of the allegations contained in the complaint of the petitioners that, "the National Railroad Adjustment Board did not give or attempt to give notice to the petitioners, who were employees to be adversely affected by the proceedings before the Board". Petitioners do not allege that the *Board* gave or attempted to give petitioners any notice but on the contrary they state (p. 13):

> "24 * * * these defendants reiterate their denial that the plaintiffs were entitled to any notice of the hearing before the National Railroad Adjustment Board, etc."

It is to be noted that the National Railroad Adjustment Board (although made parties to this suit and appeared in the district court) did not defend in the Court of Appeals and does not now defend in this Court, its failure to

have given notice to plaintiffs, as required by Sec. 3, First (j), Railway Labor Act. We believe it is safe to state that the failure of the *Board* to give notice as required by Sec. 3, First (j), of the Railway Labor Act stands admitted and the sole question involved is the application of law to the admitted facts.

We do not believe it necessary to extend this reply other than to state that where the law is plain, concise, and unambiguous there is no need for the court to do other than apply the law as written. This court has so often stated the law to be, that when the statute limits a thing to be done in a particular mode or by a particularly designated person, it excludes the doing of the thing in any other mode or by any other person. This proposition of law is so well founded that we will briefly quote from *Botany Worsted Mills* v. *U. S.*, 278 U. S. 282, 288, 289; 49 S. Ct. 129; (73 L. Ed. 379, 385):

> "We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to entrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. WHEN THE STATUTE LIMITS A THING TO BE DONE IN A PARTICULAR MODE, IT INCLUDES THE NEGATIVE OF ANY OTHER MODE. *Raleigh & G.R. Co.* v. *Reid*, 13 Wall. 269, 270, note, 20 L. Ed. 570; *Scott* v. *Ford*, 52 Or. 288, 296, 97 Pac. 99. It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. *Leach* v. *Nichols*, (C.C.A. 1st) 23 F. (2d) 275, 277. For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the government or the mills."

The question of the failure of the National Railroad Adjustment Board to give notice as required by Sec. 3, First (j), in spite of the adverse court rulings is evidenced in the report of the Attorney-General and as condemned by the Court of Appeals in *Hunter* v. *Atchison, Topeka & Santa Fe Railway Co.*, 188 F. (2d) 294 (1951) in which the court at (p. 300) states:

> "In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving *notice only to the named parties to the proceedings.* In many cases such a notice is insufficient. We so held in the previous appeal of this case."

We believe the importance of this question is reflected by the conflict of decisions in the various courts of appeals, on this identical point as well as the inconsistency found in several decisions of courts of appeals here noted. The following cases directly hold that the failure of the Board to give notice as required by Sec. 3, First (j), of Railway Labor Act renders the award *void*, as to employees to whom *no notice* was given. *Nord* v. *Griffin*, 86 F. (2d) 481, 484 (1936, C.C.A. 7), Cert. Den., 300 U. S. 673 (1937); *Hunter* v. *Atchison, Topeka & Santa Fe Railway Co.*, 171 F. (2d) 594, 597 (1948 C.C.A. 7), Cert. Den., 337 U. S. 916 (1949); *The Railroad Yardmasters of North America, Inc.* v. *Chicago River & Indiana Railroad Company, et al.*, 70 F. Sup. 915, 916, 917 (1947), Affirmed 166 F. (2d) 326, 331, (C.C.A. 7, 1948). (In this case, the present counsel for the respondents urge the invalidity of the award because of the failure of the Board to give notice as required by Sec. 3, First (j), Railway Labor Act, and cited in support thereof the case of *Nord* v. *Griffin*, 86 F. (2d) 481). *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. (2d) 527, 534 (1950), Cert. Den., 340 U. S. 823, Rehearing denied 340 U. S. 885; *Missouri-Kansas-Texas Railroad Company, et al.*, v. *Brotherhood of Railway and Steamship Clerks, et al.*, 188 F. (2d) 302, 304 (March 26, 1951).

The following cases: *Estes, et al.* v. *Union Terminal Co.*, 89 F. (2d) 768, 770, 771, (Fifth Circuit, 1937); *Obie Fauster Hunter, et al.* v. *The Atchison, Topeka & Santa Fe Railway Co., et al.*, 188 F. (2d) 294, 301, (C.A. 7), Rehearing denied 1951; and *Mary Kirby* v. *Pennsylvania Railway Co.*, 188 F. (2d) 793, 789, 799, April 23, 1951, although holding that *"Notice must be given by the Board* to all employees who may be adversely affected", they then proceed to qualify this rule of construction by interpolating the words "knowledge", "Formal notice" or "reasonable actual notice" and by such qualifications have caused confusion to arise among the courts of appeals in the construction of Sec. 3, First (j), of the Railway Labor Act.

The question presented to this Honorable Court, we believe not only to be of importance to more than 2,050,000 employees of the common carriers operating under the Railway Labor Act, (as shown by a letter under date August 7, 1951 from the United States Railroad Retirement Board), which states as follows:

> "This letter is in answer to your request of July 27, 1951. An average of 1,427,000 individuals were in employment covered by the Railroad Retirement Act in calendar year 1950. A total of 2,050,000 individuals worked in covered employment at some time during the year."

and in addition thereto being a question of first impression as stated in *Kirby* v. *Pennsylvania Railway Co.*, 188 F. (2d) 793, at 794, April 23, 1951:

> "It has never been squarely decided whether lack of notice to individual employees involved in the dispute renders the order wholly unenforceable or merely subjects it to attack at the suit of such employees",

and considering the fact that the various circuits, as above shown, have rendered conflicting opinions concerning the identical question of construction of Sec. 3, First (j), of

Railway Labor Act, and the fact that the further conduct of the instant case will depend upon the interpretation and construction by this Honorable Court of Sec. 3, First (j), of Railway Labor Act, it is respectfully requested that for the purpose of uniformity and guidance this Honorable Court will take jurisdiction by granting the prayer of the petitioners for a writ of certiorari.

IV.

Reply of petitioners to respondents' argument that the decision of the Court of Appeals, affirming the order of the District Court which granted the interlocutory injunction, after a full hearing, on the validity of Award No. 6640 and finding that the award was void, was not the "law of the case".

Reply of petitioners to respondents' argument that the decision of the Court of Appeals (*Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Company, etc., et al.*, 171 F. (2d), 594 (C. A. 7), Cert. den. 337 U. S. 916.) In the instant case affirming the order of the District Court (*Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Co., etc., et al.*, 78 F. Supp., 934) granting an interlocutory injunction after a full hearing on the validity of Award No. 6640 and finding that the award was void, was not the "law of the case".

The case of *Rogers* v. *Hill*, 289 U. S., 582, 77 L. Ed., 1385, cited by the respondents does not support their contention that the finding by the District Court (*Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Co., etc., et al.*, 78 F. Supp. 934) based upon evidence offered by the parties to the suit, that Award No. 6640 was void and the affirmance of the order granting the interlocutory injunc-

tion by the Court of Appeals of the Seventh Circuit (*Hunter, et al.* v. *The Atchison, Topeka and Santa Fe Railway Co., etc., et al.*, 171 F. (2d) 594 (C.A. 7) Cert. den. 337 U. S., 916), was not the "law of the case", in that the interlocutory injunction in *Rogers* v. *Hill*, 289 U. S., 582, 77 L. Ed. 1385, 1388, was issued solely on a motion on the pleadings and no evidence was heard, no findings of fact made and no point of law was decided. A writ of certiorari was granted to the Court of Appeals because the District Court had dismissed the bill of complaint upon the merits and the order of dismissal was affirmed by the court of Appeals.

United States v. *United States Smelting, Refining & Mining Co., et al.*, 339 U. S. 186, cited by the respondents, does not support their contention. This case was a suit to enjoin the enforcement of orders of the Interstate Commerce Commission, the District Court granted a permanent injunction against their enforcement. On direct appeal the Supreme Court reversed a prior order of the Interstate Commerce Commission which found that the line-haul rates were not compensatory for services rendered. The appellees contended that this decision became the "law of the case". This Court, at page 198, clearly defines the "law of the case":

> "The rule of the 'law of the case' is a rule of practice based upon sound policy that when an issue is once litigated and decided, that shall be the end of the matter (citing cases). It is not applicable here because when the case was remanded, nothing was finally decided."

In the instant case there was something decided on appeal from the granting of the interlocutory injunction. The sole question involved was the validity of Award No. 6640. The District Court, after a full hearing, on application for the interlocutory injunction, made a finding of fact, finding

that the Award was void, because the National Railroad Adjustment Board had disregarded the provision of the Railway Labor Act (Section 3, First (j), 45 U. S., C. A. Section 153, First (j)), by failing to give any *notice* to the petitioners who were parties involved in the dispute. The Court of Appeals, on appeal from the order of the District Court, in affirming said order, again found that Award 6640 was void. This Court, upon due consideration of the matter, denied a petition for writ of certiorari.

Although it is not contended that the denial of application for writ of certiorari is equivalent to an affirmance of the decree, we believe this Honorable Court has held that an issue decided on the appeal from the order granting the interlocutory injunction was the "law of the case" and not only should have been followed by the District Court as was done in the case at bar, but furnished a rule for the guidance of the Court of Appeals. It is the failure of the Court of Appeals to follow the "law of the case" as stated in its prior opinion in the case at bar (*Hunter et al.* v *The Atchison, Topeka and Santa Fe Railway Co., etc., et al.*, 171 F. 2d, 594 (C. A. 7), cert. den., 337 U. S. 916) which this Honorable Court is respectfully requested to review. This Honorable Court, in *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Company*, 240 U. S. 251 (60 L. ed. 629) granted a writ of certiorari to the Court of Appeals to review a decree which, on a second appeal, reversed the decree of the District Court with directions to enter a decree against the defendant. It appears from the opinion that in a prior appeal the Court of Appeals had reversed a decree of the trial court, with directions to decree an injunction, etc. The petition for writ of certiorari was denied (60 L. ed., 632). On the second appeal, the Court of Appeals reversed the decree of the trial court with directions and it was contended that the issue decided on prior

appeal in the case was the "law of the case", which was to be followed by the District Court and the Court of Appeals. This Honorable Court in *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Company,* 240 U. S. 251, 60 L. ed., 629, at P. 634, states:

> "It is, of course sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling the "law of the case", so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings (citing cases)."

Every question of law or fact which was before the Court of Appeals and was decided by their opinion, was thereby conclusively settled for the District Court upon the subsequent proceedings and it was proper for the District Court to proceed in conformity with the mandate and opinion of the Court of Appeals. No other rule is conceivable, having regard to the putting an end to litigation, *Wm. Wrigley, Jr. Co.* v. *L. P. Larson, Jr. Co.,* 5 F. (2d) 731-735 D. C. N. D. Ill. E. D. The last cited case quotes with approval the proposition of law, that the decision of the Court of Appeals upon the affirmance of an order granting an interlocutory injunction is to be followed as the "law of the case" by a trial court in subsequent proceedings; and at page 736, states:

> "In *Bissell Carpet Sweeper Co.* v. *Goshen Sweeper Co.,* 72 F. 545, 19 C. C. A. 25 (C. C. A. 6), the Circuit Court of Appeals, upon a former appeal, had affirmed a preliminary injunction, but in so doing it had decided questions going into the *merits of the case,* as well as those relating to the abuse of discretion by the

> trial judge in granting the injunction. It was held that reference must be made in executing the mandate to the opinion of the court, and that the decision on the questions which were in fact considered and decided became the 'law of the case', and was binding upon the lower court."

In Brown v. *Lanyon Zinc Co.*, 179 F. 309, 310; 102 C. C. A. 497; (C. C. A. 8) cited in *Wm. Wrigley, Jr. Co.* v. *L. P. Larson, Jr. Co.*, 5 F. 2d, 731, 736 (D. C., Ill), the Court of Appeals of the 8th Circuit was requested to reconsider a prior ruling that no infringement resulted from the use of a certain patent but refused to so do and adhered to the law as stated in the case in its prior opinion, and states as follows:

> "That ruling turned upon the interpretation of the claim in suit, and is now a part of the 'law of the case', whether it was right or wrong. It was adhered to after due consideration of a timely petition for a rehearing, and the Circuit Court, as in duty bound, has respected and enforced it in the subsequent proceedings. True, it was made upon an appeal from an interlocutory decree granting an injunction, but that did not render it less obligatory upon the Circuit Court, and does not except it from the settled rule that propositions once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal or writ of error (citing cases)."

The identical question is respectfully submitted to this Honorable Court for its consideration because the Court of Appeals in the instant case did not follow its decision on prior appeal which held, that Award No. 6640 was void because the National Railroad Adjustment Board had disregarded Section 3, First (j), of the Railway Labor Act.

It is respectfully called to the attention of this Honorable Court that the Court of Appeals of the Eighth Circuit, in *Brotherhood of Railroad Trainmen* v. *Templeton* 181 F.

2d, 527, 534, Cert. den., 340 U. S. 823, rehearing den., 340 U. S. 885 and the Court of Appeals of the Seventh Circuit in *Missouri-Kansas- Texas Railroad Company, et. al.*, 188 F. 2d 302 (1951) adhered to the well established proposition of law that an award entered without notice by the National Railroad Adjustment Board, to employees who would be adversely affected is *void* as to the rights of such employees and violates the due process of law clause of the Fifth Amendment of the Federal Constitution.

CONCLUSION.

It is respectfully requested that this Honorable Court will grant the prayer of the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated 22 day of August, 1951.

Respectfully submitted,

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